Supreme Court, U.S.
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942053 JUN 8 - 1995

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No. ____

In The

Supreme Court of the United States

October Term, 1994

WAYNE NELSON and ANTHONY MANOS, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

WILLIAM MURPHY, Acting Director Department of Mental Health and Developmental Disabilities; ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, Associate Director for Forensic Services, Department of Mental Health and Developmental Disabilities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a federal court abstain from considering a patient's federal constitutional challenge to a state mental hospital's decision to restrict the patient's liberty under Younger v. Harris, 401 U.S. 37 (1971), because of the availability of a state forum in which the patient could have, but did not, challenge this restriction?

2. Does a state's decision to retain jurisdiction over persons acquitted by reason of insanity and to subject review of their treatment and release to state courts render a federal court challenge by an insanity acquittee to the conditions of his confinement an interference with a state criminal prosecution subject to abstention under Younger v. Harris?

3. Should this Court's decision in Heck v. Humphrey, 114 S.Ct. 2364 (1994), that a convicted prisoner may not obtain damages for allegedly unconstitutional conviction or imprisonment unless the conviction or sentence has been reversed, be extended to a decision by a state mental hospital to restrict the liberty of a patient confined in that hospital whenever state law provides that the conditions of confinement may be supervised by state courts?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
State Proceedings	6
U.S. District Court Proceedings	8
Seventh Circuit Proceedings	11
REASONS FOR GRANTING THE WRIT	15
I. The Seventh Circuit's Decision Conflicts With Those of Other Circuits In Applying Younger Abstention to a §1983 Claim Involving The Conditions of Confinement at a State Instititon	15
II. The Seventh Circuit's Decision Conflicts With Decisions of this Court that Claims Under §1983 Are Not Subject to an Exhaustion Requirement	27

III. The Seventh Circuit's Decision Conflicts With Decisions of this Court that Persons Who Are Acquitted by Reason of Insanity May Not Be Punished. 29

IV. The Seventh Circuit's Decision Conflicts With This Court's Decision in Gerstein v. Pugh and the Eighth Circuit's decision in Coley v. Clinton 32

V. The Seventh Circuit's Decision Will Affect the Right of Thousands of Patients to Challenge in Federal Court their Conditions of Confinement in State Institutions 35

VI. The Seventh Circuit's Decision Conflicts With This Court's Decisions in Heck v. Humphrey and Wolff v. McDonnell 42

CONCLUSION 56

APPENDIX (Bound separately)

Appendix A

Nelson v. Murphy A-1

44 F. 3d 497 (7th Cir. 1995)

reh'g denied, 44 F. 3d 504 A-14

Nelson v. Murphy A-17

Memorandum Opinion and Order of District Judge Nordberg (March 9, 1994)

Nelson v. Murphy A-42

Report and Recommendation of Magistrate Judge Pallmeyer (September 30, 1992)

Appendix B

730 ILCS 5/5-2-4 B-1

TABLE OF AUTHORITIES

Cases **Page(s)**

Alexander v. Ieyoub 43
---F. 3d---, 1995 U.S.App. LEXIS 12152 (5th Cir. May 19, 1995)

Burford v. Sun Oil 10
319 U.S. 315 (1943)

Carey v. Piphus 48
435 U.S. 247 (1978)

Channer v. Mitchell 52
43 F. 3d 786 (2nd Cir. 1994)

Coley v. Clinton 34,35
635 F. 2d 1364 (8th Cir. 1980)

Deakins v. Monaghan 13
484 U.S. 193 (1988)

Family Div. Trial Lawyers v. 26
Moultrie,725 F. 2d 695
(D.C. Cir. 1984)

Farmer v. Brennan 41
114 S.Ct. 1970 (1994)

Felder v. Casey 28
487 U.S. 131 (1988)

Foucha v. Louisiana 30,32
112 S.Ct. 1780 (1992)

Gerstein v. Pugh 32,34,35
420 U.S. 103 (1975)

Hanna v. Toner 24
630 F. 2d 442 (6th Cir. 1980)

Harris v. Pernsley 18,19
755 F. 2d 338 (3rd Cir. 1985)

Heck v. Humphrey ii,12,43-47
114 S.Ct. 2364 (1994) 49-53

Howlett v. Rose 28
496 U.S. 356, 367 (1990)

Jones v. United States 29-32
463 U.S. 354 (1983)

LaShawn A. v. Kelly 25-26,41
990 F.2d 1319 (D.C. Cir. 1993)

Marks v. Stinson 19
19 F. 3d 873 (3rd Cir. 1994)

McGrew v. Texas Bd. of Pardons & Paroles
47 F. 3d 158 (2nd Cir. 1994) 52

Nelson v. Murphy
44 F.3d 497 (7th Cir. 1995) passim

New Orleans Public Service v. City of New Orleans
491 U.S. 350 (1989) 54

Patsy v. Bd. of Regents of Fla.
457 U.S. 496 (1982) 28

People v. Crews
122 Ill.2d 266,
522 N.E.2d 1167 (1988) 31

People v. Owens
269 Ill.App.3d 152,
645 N.E.2d 483 (2nd Dist. 1995) 54

People v. Roush
101 Ill.2d 355,
462 N.E.2d 468 (1984) 25

Wilson v. Seiter
111 S.Ct. 2321 (1991) 41

Wolff v. McDonnell
418 U.S. 539 (1974) 43-46

Youngberg v. Romeo
457 U.S. 307 (1982) 5

Younger v. Harris
401 U.S. 37 (1971) passim

Zinermon v. Burch 48
494 U.S. 113 (1990)

Statutes and Rules

42 U.S.C. § 1983 passim

405 ILCS 5/1-100 50

405 ILCS 5/3-814 21,39

405 ILCS 5/3-802 51

405 ILCS 5/3-816(b) 51

405 ILCS 5/6-100 50

730 ILCS 5/5-2-4 passim

730 ILCS 5/5-2-6 31

Alaska Stat. 12.47.090 (1994) 37

Ariz. Rev. Stat. 13-3994 (1994) 37

Ariz. Rev. Stat. 36-540.01 (1994) 40

Cal. Pen. Code 1026 (1995) 37

Fla. Stat. 916.107(3)(a)(3) (1994) 40

Ohio Rev. Code 2945.40(F) (1994) 38

Ohio Rev. Code 5122.15 (1994) 40

R.I. Gen. Laws 40.1-5-10 (1994) 39

Tenn. Code 33-7-303 (1994) 37

N.D.Ill. R. 12(Q) 8

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1994

WAYNE NELSON and
ANTHONY MANOS, *Petitioners,*

v.

WILLIAM MURPHY, Acting Director, Illinois Departmentof Mental Health and Developmental Disabilities; ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, Associate Director for Forensic Services, Illinois Department of Mental Health and Developmental Disabilities, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Wayne Nelson and Anthony Manos respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on March 13, 1995.

OPINIONS BELOW

The judgment and opinions of the United States Court of Appeals for the Seventh Circuit of which review is sought are reported at 44 F. 3d 497 (7th Cir. 1995).[1] Appendix at A-1. The opinions of the Court of Appeals upon Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc are reported at 44 F. 3d at 504 (7th Cir. 1995). Appendix at A-14.

The opinion of the United States District Court for the Northern District of Illinois is unreported. Appendix at A-17. The report and recommendation of the Magistrate Judge is also unreported. Appendix at A-42.

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[1]The names of all parties to the present Petition for Writ of Certiorari appear on the cover. The same parties were involved in the proceedings before the United States Court of Appeals and the United States District Court. None of the parties to this litigation are corporations.

JURISDICTION OF THIS COURT

The final judgment of the United States Court of Appeals for the Seventh Circuit of which review is sought was entered on January 4, 1995. Nelson v. Murphy, 44 F. 3d 497 (7th Cir. 1995). Appendix at A-1. A timely Petition for Rehearing with Suggestion for Rehearing En Banc was filed with that court on January 18, 1995. The panel majority denied the Petition for Rehearing on March 13, 1995. Nelson v. Murphy, 44 F. 3d at 504. Appendix at A-14. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

730 ILCS 5/5-2-4. Due to its length, the full text of this Illinois statute is set forth in the Appendix at B-1.

STATEMENT OF THE CASE

Petitioners Wayne Nelson and Anthony Manos brought this action in the United States District Court for the Northern District of Illinois pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief against Respondents William Murphy, Roalda Alderman and Terry Brelje, officials of the Illinois Department of Mental Health and Developmental Disabilities ("the Department"). Petitioners claimed that they were deprived of their liberty in violation of the Due Process Clause of the Fourteenth Amendment when Respondents summarily and permanently terminated their right to go outside the living quarters of the Elgin Mental Health Center. Petitioners claimed that this deprivation of liberty was not based upon the exercise of

individualized professional judgement in violation of this Court's holding in Youngberg v. Romeo, 457 U.S. 307 (1982). Jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1131, 1343, 2201 and 2202.

Petitioners Nelson and Manos were acquitted by reason of insanity by the Circuit Court of Cook County, Illinois. (A-2)[2] Both Petitioners were committed to the custody of the Department for an indefinite period pursuant to 730 ILCS 5/5-2-4, the Illinois law governing the confinement of insanity acquittees. Petitioners were both confined at Elgin Mental Health Center, a mental hospital operated by the Department. (A-49)

Illinois law permits insanity

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[2] All factual references are to the opinions of the District Court or the Seventh Circuit set forth in the Appendix.

acquittees to go unaccompanied on the grounds of the mental hospital in which they are confined, but only when the facility director recommends such a grounds pass and the court which presided over their acquittal approves the recommendation. 730 ILCS 5/5-2-4(b). Both Petitioners were recommended for grounds passes by Respondent Alderman and both recommendations had been approved by the respective judges who presided over their acquittals. (A-53, 55-56)

State proceedings

On May 30, 1990, Respondents terminated the grounds passes of all the approximately 80 patients at Elgin who had such passes. (A-58) Both Petitioners were among those who had their grounds passes discontinued. (A-58,59) Respondents notified circuit

court judges by letter that it had terminated Petitioners' passes. (A-91) However, since Illinois law only requires circuit court approval prior to the issuance of passes and not prior to their termination, 730 ILCS 5/5-2-4(b), circuit courts played no role in the termination of Petitioners' passes. (A-59)

Several weeks later, Respondent Alderman requested permission of the circuit courts pursuant to 730 ILCS 5/5-2-4(b) to issue a much more limited grounds pass to some patients, including Petitioner Nelson, to be effective once Elgin had constructed a fence. (A-60,61,62) Petitioner Nelson's new restricted pass was approved by the court in a proceeding in which he did not participate. (A-39)

Federal District Court Proceedings

In July, 1990, Petitioners filed the present claim in the United States District Court pursuant to 42 U.S.C. §1983, alleging that they had been deprived of their liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioners also filed a motion for a preliminary injunction and for certification of a class comprised of all of the patients whose passes had been terminated.[3]

Petitioners alleged that Respondents terminated Petitioners' passes without exercising their

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[3] The motion for class certification was filed immediately after the initiation of the present action, was fully briefed by the end of 1990 and Petitioners made two formal written requests pursuant to N.D.Ill. R. 12(Q) that the District Court judge rule on their motion. However, the court failed to do so and a class was never certified. (A-3)

individualized professional judgment. That is, the blanket pass termination was based upon escapes from Elgin Mental Health Center. (A-91) However, the number of escapes from Elgin had been declining prior to the termination of Petitioners' passes. (A-92) Additionally, just prior to the pass termination the Respondents had individually reviewed the suitability of each patient to continue using his or her pass and had found that the Petitioners should continue to have passes. (A-93,94)

Respondents claimed that the passes were merely suspended pending the construction of a fence surrounding part of the grounds of Elgin Mental Health Center. (A-59,60) However, although the fence was completed in March, 1991 (A-60), to date no insanity acquittee has

had his or her pass reinstated. (A-61, 62)

Following a hearing, Magistrate Judge Rebecca Pallmeyer issued a Report and Recommendation that Petitioners be granted a preliminary injunction. The injunction would require Respondents to exercise their individualized professional judgment concerning the suitability of each class member for a pass. (A-114) Although Respondents filed a timely objection to this decision with District Judge John A. Nordberg, they did not contest the Magistrate Judge's findings of fact.

On March 9, 1994, District Judge Nordberg dismissed Petitioners' claim, finding that abstention was appropriate under Burford v. Sun Oil, 319 U.S. 315 (1943). (A-25,40) The court, therefore, never reached the merits of Petitioners'

claim. The district court rejected Respondents' claim that abstention was required under Younger v. Harris, 401 U.S. 37 (1971), because Petitioners did "not seek to enjoin any state court proceeding." (A-24,25)

Seventh Circuit Proceedings

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. The court unanimously agreed with Petitioners that abstention was not appropriate under Burford v. Sun Oil, Nelson v. Murphy, 44 F. 3d 497, 501, 503 (1995). However, the panel majority affirmed the decision to dismiss Petitioners' complaint, finding that Younger abstention was appropriate. The court held that Younger abstention was appropriate because Petitioners could have challenged the Respondents' decision to terminate their passes by

requesting review of this decision in the circuit courts of Illinois: "Instead of presenting objections to their treatment plans, plaintiffs filed an independent suit in federal court." Nelson, 44 F.3d at 501. "Plaintiffs had, and did not use, a state forum in which they could have presented the arguments they now urge." Nelson, 44 F.3d at 503.

The court also based its holding on the fact that Petitioners "were active litigants in state court" since they had both obtained other forms of relief from the circuit courts of Illinois. Id. at 501. The Seventh Circuit also held that Heck v. Humphrey, 114 S.Ct. 2364 (1994), which "holds that a prisoner may not obtain damages for allegedly unconstitutional conviction or imprisonment unless the conviction or

sentence has been reversed", should be extended to prevent a suit for monetary damages challenging "conditions of confinement that are actively supervised by state courts." even when the plaintiff has not challenged those conditions in state court. Nelson, 44 F.3d at 502.

Finally, the panel majority relied upon Deakins v. Monaghan, 484 U.S. 193 (1988), to dismiss Petitioners' damage claims. The court reasoned that Petitioners could have brought their damage claims in criminal court together with a challenge to the Respondents termination of their passes and that "judges of the circuit courts are empowered to provide both remedies." Nelson, 44 F.3d at 502.

Judge Cudahy dissented from the Seventh Circuit's holding abstaining

under the Younger doctrine. He argued: (1) "there are at worst parallel proceedings and there is no showing that federal proceedings will, 'damage the state interest'"; (2) "there are no ongoing or pending state proceedings to be interfered with" since "it was the Department which decided to remove passes without individual review"; and (3) "the fact that there may be a state remedy in existence but not invoked is certainly not grounds for Younger or any other species of abstention." Nelson, 44 F.3d at 503-04

On March 13, 1995, the Seventh Circuit denied Petitioners' Petition for Rehearing with Suggestion for Rehearing En Banc. The panel issued a brief new opinion. 44 F.3d at 504. Judge Cudahy reaffirmed his dissent "from the remarkable conclusion that Younger

abstention could apply when there was no federal attempt to enjoin a state proceeding, and, in fact, where there was no ongoing or pending state proceeding with which to interfere." 44 F.3d at 505.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER CIRCUITS IN APPLYING YOUNGER ABSTENTION TO A §1983 CLAIM INVOLVING THE CONDITIONS OF CONFINEMENT IN A STATE INSTITUTION

Petitioners, who were committed to a state mental hospital following acquittal by reason of insanity, brought the present suit to challenge a decision of the Respondents, officials of the state mental health department, substantially restricting Petitioners' liberty at that hospital. Petitioners alleged that this decision violated

their rights under the Due Process Clause of the Fourteenth Amendment. Because Petitioners could have, but did not, challenge the restriction on their liberty in state court and because Petitioners have been involved in other litigation in state court concerning other aspect of their confinement by Respondents, the Seventh Circuit dismissed Petitioners' claim.

The Seventh Circuit's dismissal was predicated upon its opinion that it was required to abstain under this Court's decision in Younger v. Harris, 401 U.S. 37 (1971). In Younger this Court held that principles of comity prevented a federal court from enjoining a state court prosecution. The Seventh Circuit's application of the Younger doctrine conflicts with decisions of other circuits in three ways. First,

Younger abstention has been rejected when, as in the present case, the federal plaintiffs, although participants in state court litigation, were not defendants there.[4] Second, federal courts have consistently held that conditions of confinement litigation does not require Younger abstention because it does not interfere with state jurisdiction over individual confined persons. Third, the Seventh Circuit's decision conflicts with decisions of the D.C. Circuit that Younger abstention should not be employed when the state court proceedings could not afford the relief requested in federal court.

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[4] For the reasons set forth in Argument VI(B) below, Petitioners dispute any suggestion that they were participants in any relevant state court litigation. However, even if they were, the Seventh Circuit's decision conflicts with decisions of this Court and other circuits courts.

A. The Seventh Circuit's Decision Conflicts With The Third Circuit As To Whether Younger Abstention Is Appropriate When The Federal Plaintiffs Are Not The State Defendants

The Seventh Circuit decision found Younger abstention appropriate even though Petitioners were not defendants in the state court proceedings. This decision conflicts with decisions of the Third Circuit which limit Younger abstention to cases in which the federal plaintiffs were defendants in state court.

For example, in Harris v. Pernsley, 755 F. 2d 338, 344 (3rd Cir. 1985), the court held that Younger abstention was inappropriately applied to a federal conditions of confinement lawsuit brought by prison inmates, in spite of a pending state court suit about conditions of confinement. Since the

state officials were defendants in the state proceeding "rather than plaintiffs or prosecutors seeking vindication of state law enforcement policies", Younger abstention was held inapplicable. Similarly, in Marks v. Stinson, 19 F.3d 873 (1994), the Third Circuit rejected Younger abstention even though the federal plaintiffs were seeking identical relief in contemporaneous proceedings in state court. The "mere pendency of an action in state court is no bar to proceedings concerning the same subject matter in the Federal court having jurisdiction." Marks, 19 F.3d at 882. Since Petitioners were not defendants in any relevant state proceeding, the Seventh Circuit's holding conflicts with Harris and Marks.

The Seventh Circuit suggested that its abstention decision may have been

based upon one or more of three state court "proceedings". However, in two of these state court proceedings the present Petitioners were not defendants and the third proceeding involving Petitioners had ended long before the present litigation began.

First, the Seventh Circuit bases its abstention decision on the fact that "[b]oth Nelson and Manos were active litigants in state court. As we have recounted, Nelson was especially active; he sought and obtained an order releasing him from confinement altogether in 1993." 44 F.3d at 501. However, Petitioner Nelson was the moving party in this state court proceedings seeking his conditional release. Thus, Nelson was not a defendant in this proceeding.

Second, the Seventh Circuit may

have based its abstention decision on the fact that Petitioners could have sought review of the treatment reports filed "every 60 days [by] the staff of Elgin." 44 F.3d at 501. The Seventh Circuit explains that "either [Petitioner] could have opposed the implementation of the new plan on constitutional grounds...no one doubts that the state courts had jurisdiction to consider the precise constitutional claims that have been raised here." Id. However, in the treatment plan review proceedings described by the Seventh Circuit, Petitioners would again have been the moving party seeking to challenge in state court a decision made by state government officials pursuant to 730 ILCS 5/5-2-4 and 405 ILCS 5/3-814.

Finally, Petitioners were

defendants in the criminal proceedings which led to their acquittal by reason of insanity, and following a separate hearing, their commitment to the custody of Respondents. However, as will be discussed more fully in section III below, these proceedings had long since terminated and their use to invoke Younger abstention conflicts with other precedents of this Court.

Thus the decision of the Seventh Circuit directly conflicts with two decisions of the Third Circuit. The Seventh Circuit finds that non-contemporaneous state proceedings in which the Petitioners were not the defendants can justify Younger abstention, while the Third Circuit finds that Younger abstention is inappropriate when the federal plaintiffs were not defending themselves

in contemporaneous state court proceedings seeking the same relief.

B. The Seventh Circuit's Opinion Conflicts With The Sixth Circuit Concerning The Application Of Younger Abstention To Conditions Of Confinement Litigation.

The decision below applied Younger v. Harris, 401 U.S. 37 (1971), abstention to Petitioners' claims because "an inmate already participating in state litigation must make his stand there rather than...filing an independent §1983 suit", Nelson, 44 F.3d at 503. This holding was premised on the assumption that important state interests are compromised by the "transfer of adjudication from the original state forum to the federal forum". Id at 502.

The Sixth Circuit has rejected Younger abstention under circumstances which are identical in all relevant

respects to the present action. In Hanna v. Toner, 630 F. 2d 442, 446 (6th Cir. 1980), the court rejected the application of Younger to a dispute about the conditions of confinement in a juvenile detention facility. The Hanna court noted that the federal case "represents no interference or intervention in state judicial processes, criminal or otherwise". Id. While the Ohio courts had continuing jurisdiction over those adjudicated delinquent, federal scrutiny of the §1983 complaint about the conditions of confinement in the facility was considered perfectly appropriate. This holding is in conflict with the decision below, which holds that Younger bars such scrutiny, Nelson, 44 F.3d at 502.

C. The Seventh Circuit's Decision Conflicts with Decisions of the D.C. Circuit in Applying Younger Abstention Despite the Absence of an Adequate State Forum for Adjudicating Systemic Problems.

The Seventh Circuit recognized that the circuit courts of Illinois were not available to consider challenges to systemic problems concerning the conditions of confinement of persons such as the Petitioners who are in custody after an insanity acquittal. Nelson, 44 F.3d at 501. In doing so the Seventh Circuit relied upon People v. Roush, 101 Ill.2d 355, 462 N.E.2d 468 (1984), a decision of the Illinois Supreme Court which so held. Despite this, the Seventh Circuit found that Younger abstention was appropriate. This decision conflicts with two decisions of the D.C. Circuit.

In LaShawn A. v. Kelly, 990 F.2d

1319, 1322 (D.C. Cir. 1993), the court applied the "questionable vehicle" test of Family Division Trial Lawyers v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984). In Family Division the D.C. Circuit questioned the "need or wisdom of extending Younger to all constitutional claims that might be adjudicated in state as well as federal courts", Family Division, 725 F.2d at 702. In LaShawn there were ongoing delinquency proceedings in state court. These courts had the ability to consider all of the claims brought in federal court. However, the D.C. Circuit held that the District of Columbia proceedings involving the fate of individual children were questionable vehicles for challenges to the conditions of custody of children in foster care. As a result, Younger abstention was

unwarranted. The decision of the Seventh Circuit conflicts with these decisions because the Seventh Circuit applied Younger abstention despite the unavailability of an appropriate state forum.

II. THE SEVENTH CIRCUIT'S DECISIONS OF THIS COURT THAT CLAIMS UNDER 42 U.S.C. §1983 ARE NOT SUBJECT TO AN EXHAUSTION REQUIREMENT.

The Seventh Circuit dismissed Petitioners' claim for injunctive relief under 42 U.S.C. §1983 because Petitioners failed to exhaust their available state remedies. While purporting not to require Petitioners to exhaust their state remedies, Nelson, 44 F.3d at 502, the Seventh Circuit in fact dismissed Petitioners' claims because they "had, and did not use, a state forum in which they could have presented the arguments they now urge. Their

deliberate bypass of the opportunity to litigate in state court foreclosed them from litigating in federal court." Nelson, 44 F.3d at 503.

There is no exhaustion requirement in §1983 actions. Felder v. Casey, 487 U.S. 131, 147-48 (1988); Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982). Moreover, the Supremacy Clause obligates state courts to entertain §1983 claims. Howlett v. Rose, 496 U.S. 356, 367 (1990). Thus, if the availability of a state forum to consider §1983 litigation were relevant to abstention, federal judges would always would be required to abstain from entertaining §1983 claims. Therefore, the Seventh Circuit's decision conflicts with this Court's holding that there is no exhaustion requirement.

III. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT THAT PERSONS WHO ARE ACQUITTED BY REASON OF INSANITY MAY NOT BE PUNISHED.

The Seventh Circuit also bases its Younger abstention decision on the fact that "the cases pending in state court are continuations of the original criminal prosecutions and preserving a state's right to litigate criminal cases in its own courts is the core of the Younger doctrine." Nelson, 44 F.3d at 502. This holding conflicts with the holdings of this Court that confinement following acquittal by reason of insanity is not punitive in nature, but rather for treatment and the protection of society.

In Jones v. United States, 463 U.S. 354, 369 (1983), this Court rejected a claim that insanity acquittees not be confined in excess of the criminal

sentence they would have served if convicted. The Court explained: "Different considerations underlie commitment of an insanity acquittee. As he was not convicted, he may not be punished." Similarly, in Foucha v. Louisiana, 112 S.Ct. 1780, 1785 (1992), the Court held that confinement of those found not guilty by reason of insanity after they ceased to be mentally ill violated due process because an acquittal by reason of insanity ended the State's interest in punishing the defendant.

Additionally, Illinois has demonstrated that it does not intend to permit the criminal commitment of insanity acquittees. That is, it sharply distinguishes between persons found not guilty by reason of insanity, who may be confined, if at all, only in

a mental hospital, 730 ILCS 5/5-2-4(a); and persons found "guilty but mentally ill" who may be sentenced to imprisonment just like any other convicted defendant. 730 ILCS 5/5-2-6. Indeed, the latter group may be sentenced to death. People v. Crews, 122 Ill.2d 266, 522 N.E.2d 1167 (1988).

Moreover, even though not required by the Due Process Clause, Jones, 463 U.S. at 366, Illinois prohibits confinement of insanity acquittees unless, following a separate hearing at which the state is required to establish that acquittee meets the criteria for commitment. 730 ILCS 5/5-2-4(a). In short, Illinois has disavowed any intention to treat the judicial supervision of insanity acquittees following their commitment as a "continuation of the original criminal

prosecution." Therefore, the Seventh Circuit justification of Younger abstention based upon Petitioner's earlier acquittal by reason of insanity, Nelson, 44 F.3d at 501, conflicts with this Court's decisions in Jones and Foucha, finding that the confinement of insanity acquittees cannot be part of a scheme of punishment.

IV. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN GERSTEIN V. PUGH AND WITH THE DECISION OF THE EIGHTH CIRCUIT IN COLEY V. CLINTON

The decision below also conflicts with Gerstein v. Pugh, 420 U.S. 103, 108 (1975). There, this Court rejected a Younger abstention argument because the injunction sought was "not directed at the state prosecutions as such" and the federal case involved "an issue that could not be raised in defense of the criminal prosecution" which "could not

prejudice the conduct of the trial on the merits". All three of these factors apply in the present case as well. Conditions of confinement litigation has nothing to do with criminal prosecutions. If, as Magistrate Judge Pallmeyer recommended, Petitioners received injunctive relief, that relief would not interfere with any state proceedings involving the Petitioners or the Respondents. Requiring the Respondents to give individualized consideration to Petitioners' eligibility for passes will have no effect on any existing or past state litigation. That is because Illinois courts are only required to review and approve decisions by the Respondents to grant additional liberty, not decisions by Respondents to take away Petitioners' liberty. 730 ILCS 5/5-2-4(b). Thus, the

injunction sought by Petitioners, like that sought in Gerstein, may simply cause the state courts to have **additional** proceedings to review recommendations for passes which are likely to result from the exercise of individualized professional judgment by Respondents.

Gerstein has been applied to facts quite similar to those present here. In Coley v. Clinton, 635 F.2d 1364, 1372 (8th Cir. 1980), the Eighth Circuit was faced with a challenge to the conditions of confinement imposed upon insanity acquittees in Arkansas. The court rejected Younger abstention, explaining:

> The Younger restriction on federal court interference with ongoing state court proceedings closely related to the criminal law, however, does not apply to actions against state officials which are not part of such ongoing state court criminal proceedings.(citing Gerstein, 420 U.S. at 108).

Petitioners' claim does not interfere with state criminal proceedings, since those proceedings terminated with Petitioners' acquittal. Therefore, the Seventh Circuit's decision conflicts with both Gerstein and Coley.

V. THE SEVENTH CIRCUIT'S DECISION WILL AFFECT THE RIGHT OF THOUSANDS OF PATIENTS IN STATE INSTITUTIONS TO CHALLENGE THE CONDITIONS OF THEIR CONFINEMENT IN FEDERAL COURT

The Seventh Circuit based its abstention decision on the fact that Illinois had created a system under which the state courts could supervise the treatment and conditions of confinement of insanity acquittees such as Petitioners. Nelson, 44 F. 3d at 501. However, this rationale applies equally well to thousands of other persons who have claims that their conditions of confinement violate the United States

Constitution. Many other states have arrangements in which the state courts monitor the conditions of confinement, not only for insanity acquittees but also for every other person committed to state mental hospital, as well as persons confined in prisons, jails and juvenile facilities.

A) Many States Require Continuing State Court Involvement in the Treatment and Conditions of Confinement of Insanity Acquittees.

Many states have statutory provisions governing the treatment of insanity acquittee similar to those of Illinois. For example, the California Penal Code provides for court review of various conditions of confinement. For an insanity acquittee to transfer from one mental health facility to another, for instance, the director must submit a written recommendation to the court,

which can then order the transfer. Cal. Pen. Code 1026(c) (1995). In addition, the director "shall, at six-month intervals, submit a report in writing to the court...setting forth the status and the progress of the defendant." Id. The court is responsible for ensuring that the conditions of confinement continue to conform to the patient's program of treatment. Cal. Pen. Code 1026.2(b) (1995).

Numerous other states have similar laws. Examples include: Tenn. Code 33-7-303 (1994)(Committing court must monitor treatment plans.); Alaska Stat. 12.47.090 (1994) (periodic written reports to committing court of the condition of the patient required); Arizona Rev. Stat. 13-3994 (1994) (court hearing required within 75 days of commitment); Ohio Rev. Code

2945.40(F)(1994) (court must have hearing and determine whether mental health facility may transfer and alter other conditions of confinement). Thus, the reasoning of the Seventh Circuit applies to a substantial number of persons all across the United States who are confined in state institutions following acquittal by reason of insanity.

B) Many States Require Continued State Court Involvement For All Persons Involuntarily Confined in State Hospitals.

Many states also provide for continuing state court involvement in the conditions of confinement and treatment of everyone confined in state hospitals, including patients who have no previous involvement in the criminal justice system. For example, the statutory provision for judicial

supervision of insanity acquittees in Illinois, relied upon by the Seventh Circuit, incorporates by reference a provision which applies to everyone who is involuntarily committed. That statute reads:

> Not more than 30 days after admission..., the facility director shall file a current treatment plan with the court which includes an evaluation of the recipient's progress and the extent to which he is benefitting from treatment. The court shall review the treatment plan. 405 ILCS 5/3-814.

Similarly, Rhode Island law requires that the quality of care and the patient's treatment plan be reviewed every ninety days, and that this review be entered into the patient's record for review. R.I. Gen. Laws 40.1-5-10 (1994). Florida law requires that any treatment not consented to be submitted to and ordered by the court. Fla. Stat.

916.107(3)(a)(3). (1994). See also Ariz. Rev. Stat. 36-540.01-02 (1994) (court shall order least restrictive treatment, and shall be presented with and approve written treatment plan), and Ohio Rev.Code 5122.15 (1994) (court shall order placement in least restrictive environment at submission of facility or person). If the Seventh Circuit decision is given its potential reach, a substantial proportion of the mentally ill in the United States would be barred from bringing §1983 claims contesting unconstitutional conditions of confinement in a federal forum.

C) The Seventh Circuit's Holding Could Foreclose Federal Jurisdiction over Conditions of Confinement Litigation Brought by Juveniles, Pretrial Detainees and Convicted Prisoners.

Finally, there is nothing to distinguish the circumstance of the

present case from other areas of the law, such as family law, foster care, and other custodial situations, where there is ongoing review by state courts. Such review already exists for juveniles. See LaShawn A. v. Kelly, 990 F.2d 1319, 1323 (D.C. Cir. 1993) (rejecting Younger abstention despite District of Columbia court review every six months). Under the Seventh Circuit's reasoning, a state can prevent the federal courts from considering constitutional challenges to the conditions of confinement by providing a state forum to consider such claims. This rule could affect pre-trial detainees and convicted prisoners. Both groups have frequently brought claims involving conditions of confinement to federal courts. Farmer v. Brennan, 114 S.Ct. 1970 (1994); Wilson v. Seiter, 111

S.Ct. 2321 (1991). This Court should grant the present petition to review the remarkable conclusion that constitutional challenges to conditions of confinement may no longer be brought in federal court so long as the state provides a forum for such claims.

VI. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN HECK V. HUMPHREY AND WOLFF V. MCDONNELL

Having disposed of Petitioners' claim for injunctive relief on abstention and exhaustion grounds, the Seventh Circuit then dismissed the petitioners' claim for damages on the grounds that Heck v. Humphrey, 114 S.Ct. 2364 (1994), supported an exhaustion requirement for conditions of confinement litigation when the conditions complained of are "actively supervised by state courts." Nelson v.

Murphy, 44 F.3d 497, 502 (1995).[5] This application of Heck directly conflicts with Wolff v. McDonnell, 418 U.S. 539 (1974), as recently affirmed in Heck, 114 S.Ct. at 2370. Heck held that §1983 claims should not be dismissed by a federal court if the plaintiff's action, even if successful, will not demonstrate the invalidity of any underlying state court criminal judgment. Heck, 114 S.Ct. at 2370. Moreover, the Court of Appeals' extension of Heck to a civil claim challenging an administrative decision unrelated to the fact or duration of confinement is unsupported by the language of Heck, and represents

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[5] The decision to dismiss Petitioners' claim for damages also conflicts with the decision of the Fifth Circuit in Alexander v. Ievoub, ---F. 3d---, 1995 U.S.App. LEXIS 12152 (May 19, 1995) (Younger abstention inappropriate despite pendency of state forfeiture proceeding and state damage action because Younger does not apply to claims for damages only).

a radical break with the uniform treatment of Heck by other circuit courts. This court should grant certiorari to resolve this conflict and clarify the continuing validity of Wolff v. McDonnell.

A. The Seventh Circuits' Dismissal of Petitioners' § 1983 Damages Claims Conflicts with Wolff v. McDonnell and Heck v. Humphrey Because Petitioners Can Prevail on the Present Damage Claim Without Challenging the Validity of Any State Court Judgment.

Heck holds that, if a "plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed...." 114 S.Ct. at 2372. The Seventh Circuit's dismissal of Petitioners' §1983 damages claim conflicts with this holding. Success on Petitioners' claim for damages would

require proof that the procedures followed in removal of grounds passes were inadequate, and that the petitioners suffered harm from this denial of due process. Neither of these elements would imply that a state court decision--criminal or otherwise--is unlawful. The Seventh Circuit's decision, therefore, is in direct conflict with both Heck and Wolff.

Wolff v. McDonnell, as recently affirmed in Heck v. Humphrey, demonstrates that even where dismissal of an injunctive claim may be appropriate, under Heck a claim for damages should be heard. See Heck, 114 S.Ct. at 2370. The Wolff plaintiff sought damages and injunctive relief under §1983 on the grounds that the procedures for deprivation of his good time credits were constitutionally

inadequate. Wolff, 418 U.S. at 553. The Wolff court affirmed the dismissal of the plaintiff's injunctive relief, but held that the damages claim was properly before the court. Id. at 554-55. Success on the damages claim "did not call into question the lawfulness of the plaintiff's continuing confinement," since using the wrong procedures did not necessarily vitiate the denial of good-time credits. Heck, 114 S.Ct. at 2370. The plaintiff could win on his procedural claim even if the denial of credits itself was entirely lawful. Id. The claim would therefore have no preclusive effect on a state court's decision regarding the lawfulness of confinement, and the comity concerns underlying Heck would be inapplicable. Id.

The Seventh Circuit seems to have

applied Heck under the assumption that a state court had approved Respondents' termination of Petitioners' passes.[6] The Seventh Circuit then found that, under Heck, the state court proceeding prevent the present damage claim. This extension was based upon the Seventh Circuit's view that, in order to prevail in the present damage claim, Petitioners would have to demonstrate that the state court's "approval" was invalid. However, this view is simply incorrect.

Respondents terminated Petitioners' passes suddenly and without process. (A-59) The Seventh Circuit's decision rests on the assumption that this pass termination was later approved by a state court. However, even if the state

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[6] For reasons discussed below in Argument VI(B), no state court actually ruled upon the termination of Petitioners' passes.

court's "approval" were correct[7], it would not eliminate Petitioners' claim for damages. Due Process ordinarily requires pre-deprivation process. Zinermon v. Burch, 494 U.S. 113, 127 (1990). Since Respondents have conceded that no emergency existed which would justify the failure to provide such process, Petitioners may prevail on their damage claim even if their injunctive claim no longer has merit. Carey v. Piphus, 435 U.S. 247, 263 (1978).

A supposed state-court approval of the Respondents' termination of passes could foreclose a claim for damages beyond the date of that approval, but it

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[7] Only Magistrate Judge Pallmeyer ever reached the merits of Petitioners' challenge to the termination of their passes. She found for Petitioners and held that this deprivation violated the Due Process Clause of the United States Constitution. (A-114)

would not vitiate a claim, such as the present one, that Respondents violated Petitioners' right to Due Process when they failed to provide them with pre-deprivation procedures. Thus, the Seventh Circuit's holding directly conflicts with this Court's holdings in Wolff and Heck in dismissing Petitioners' damage claim even though the success of that claim did not require the invalidation of any state court decision.

B) The Seventh Circuit's Decision Improperly Extends Heck v. Humphrey to Civil, Non-Judicial State Decisions Not Involving the Fact or Duration of Confinement.

Heck v. Humphrey, 114 S.Ct. 2364, 2372 (1994), holds that if a plaintiff's federal action will depend for its success on demonstrating the invalidity of any outstanding criminal judgment against the plaintiff, the action should

not be allowed to proceed. The Seventh Circuit has departed from this principle by applying the Heck doctrine to a non-judicial, civil decision involving only the conditions of Petitioners' confinement and not the fact or duration of their confinement.

First, as discussed in Argument III above, the criminal proceedings against Petitioners terminated with their acquittal. Moreover, Illinois law provides that the proceedings governing the confinement and treatment of insanity acquittees are civil. The relevant state statute, 730 ILCS 5/5-2-4(a) incorporates by reference the state civil commitment law, 405 ILCS 5/1-100, et seq., which, in turn, expressly provides that commitment proceedings "are civil in nature." 405 ILCS 5/6-100. Other provisions of the civil

commitment law also refer to its civil nature. 405 ILCS 5/3-802 (selection of jurors); 405 ILCS 5/3-816(b)(appeals). The state court proceedings which were the basis for the application of Heck were civil rather than criminal..

Heck held that dismissal of a §1983 claim is appropriate in only two instances: (i) where a plaintiff attempts to attack the fact of confinement, thereby implicating the validity of the underlying conviction itself; and, (ii) where a plaintiff attempts to attack the duration of confinement, and success on the claim would require a remedy of release from custody. Heck, 114 S.Ct. at 2372. Even if the Heck doctrine should be applied to proceedings to commit someone to a mental hospital, the present Petitioners are not challenging the fact or duration

of their confinement to a mental institution. Rather, they are challenging a decision by the Respondents to terminate grounds passes. No court has ever applied Heck to a claim of this type. Heck has consistently been applied only where a plaintiff's claim would call into question a underlying conviction or sentence. See, for example, Channer v. Mitchell, 43 F. 3d 786 (2nd Cir. 1994)(claim that police officers perjured themselves on stand and coerced witnesses into wrongfully identifying plaintiff as suspect); McGrew v. Texas Board of Pardons & Paroles, 47 F. 3d 158, 161 (5th Cir. 1995)(claim attacking revocation of parole as unlawful confinement).

Finally, Petitioners are not challenging a judicial decision. Thus,

even were Heck to be extended to §1983 claims based on civil judgments and attacking something other than the fact or duration of confinement, dismissal of the Petitioners' damage claim would be erroneous. Petitioners' §1983 claim alleges that the procedures by which their on-grounds and off-grounds passes were removed failed to satisfy the constitutional standard necessary for deprivation of liberty. This deprivation was not caused by state court action but by the unilateral decision of the Respondents.

Nor, contrary to the Seventh Circuit's suggestions, did a state court ever approve of the pass termination. Magistrate Judge Pallmeyer's Report and Recommendation spells out that the Respondents unilaterally decided to

terminate the passes.[8] (A-58) Respondents then informed the relevant state court judges by sending them a letter. However, while Illinois law requires state court approval prior to the issuance of a pass, no state court approval is required for pass terminations. 730 ILCS 5/5-2-4 (b). Indeed, a person contesting the failure of Respondents to issues a pass is not even entitled to a state court hearing. People v. Owens, 269 Ill.App.3d 152, 645 N.E.2d 483 (2nd Dist. 1995). Thus, at no time during the long course of this litigation have Respondents argued that Petitioners federal claim is barred by res judicata or collateral estoppel.

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[8] In this regard the Seventh Circuit's decision also conflicts with the decision of this Court in New Orleans Public Service v. City of New Orleans, 491 U.S. 350, 370 (1989) (requiring judicial type proceedings in order to apply Younger abstention).

Nelson, 44 F. 3d at 503. Nor have Respondents ever produced a transcript or other evidence that such a hearing took place. That is because there were no state court proceedings. Since there were no state court proceedings, Heck is inapplicable.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Court to grant this petition for certiorari. Alternatively, Petitioners seek summary reversal of the decision below.

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* Counsel gratefully acknowledges the assistance of Adam Goodman '95, Bettina Neuefeind '96 and Sharon Swingle '96, students at the University of Chicago Law School, in the preparation of this petition.